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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

STEPHEN JOSEPH MCELROY,

Defendant and Appellant.

G054859

(Super. Ct. No. 15CF1564)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jonathan S. Fish, Judge. Affirmed.

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Eric A. Swenson and Jennifer B. Truong, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Stephen Joseph McElroy of battery causing serious bodily injury (Pen. Code, § 243, subd. (d); all further statutory references are to this code, unless noted), and found several penalty enhancement allegations to be true, including that defendant personally inflicted great bodily injury on the victim (§ 12022.7, subd. (a)) and personally used a deadly weapon (§ 12022, subd. (b)(1)). The trial court sentenced defendant to the low term of two years in state prison. Defendant contends his conviction must be reversed because the court admitted photographs of the victim's injuries that were more prejudicial than probative (Evid. Code, § 352). In particular, defendant emphasizes testimony showing the victim had been in another fight earlier that same day. And as a result, he argues the trier of fact could not ascertain which injuries, if any, depicted in the admitted photos were due to his altercation with the victim in this case. As we explain, the court exercised its discretion and properly left this factual determination to the jury. In any event, any conceivable error was harmless because the evidence overwhelmingly supported the verdict. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Around 2:00 a.m. on July 12, 2015, a neighbor saw defendant engaged in an argument with the victim, Jon P., near the end of defendant's driveway. The neighbor testified that he saw Jon P. fall "straight back" "once he was struck," with his hands at his side instead of bracing his fall. The neighbor then called 911 because he thought the victim was dead.

Officer Gerardo Raya of the Santa Ana Police Department responded to the scene and found Jon P. lying on the ground. He was bleeding from the area in or around his right ear, with a pool of fresh blood under his head. Soon Jon P. was moving, but he remained incoherent. When Raya attempted to render aid, Jon P. initially resisted when he was directed to remain still to avoid further injury. Raya found no weapons on or near Jon P., but discovered a methamphetamine pipe in his pocket. Paramedics transported

Jon P. to the hospital, where he remained for 10 days. His injuries included a broken right upper jaw (fractured “matrix maxillary”) and brain bleeding (“intracranial hemorrhaging”), as well as an injury to his left lower eye socket (“orbital floor blowout fracture”).

Raya, while still at the scene, attempted unsuccessfully to locate defendant, who was not at home; his daughter told Raya she did not know his whereabouts. A day or two later, defendant bragged to a neighbor that he had “knock[ed] some tweaker out.” He told the neighbor that when he struck the man, he stated, “How do you like me now, bitch?”

Persisting in his investigation, Raya later found defendant at home. During his later interview with Raya, defendant claimed that he had given Jon P. a dollar earlier that day, and Jon P. appeared to follow him to his house. Defendant said Jon P. complied when he asked him to leave. He denied striking Jon P. and denied knowing that anyone had been injured in front of his home. Raya placed defendant under arrest at the end of the interview.

At trial, a neighbor, Larry V., testified that Jon P. was a transient who frequented the neighborhood and visited Larry V.’s daughter, Tina, whom Jon P. knew. Larry V. explained that sometimes when Jon P. was belligerent, he and his grandson had to chase him away. Although Jon P. was verbally confrontational, he never tried to fight Larry V.

Defendant testified at trial that he knew Jon P. through his neighbor, Tina. Defendant explained that in the middle of the night when he was home with his 21-year-old daughter and 90-year-old mother (who was in hospice care), he awoke due to his dog barking and found Jon P. outside his home, demanding to see Tina. Jon P. would not leave after defendant explained Tina did not live there. Yelling and cursing incoherently, like he was “high on drugs,” Jon P. started to move down defendant’s

driveway. Defendant followed him to make sure he departed, but when defendant turned back toward his home, Jon P. followed him.

Defendant claimed he believed Jon P. was going to charge him, so he “picked up a board and figured I would try that, . . . you know.” He testified that when Jon P. took a step towards him, he “gave him a tap” with the board, and Jon P. fell to the ground. Retreating back inside his house to wash up, defendant saw Jon P. sit up and heard him moan; his daughter also went outside to “make sure [Jon P.] was still alive.” Defendant further stated he checked on Jon P. and did not see any blood.

The neighbor who called 911, Neal D., also testified. A long-time neighborhood resident, he had watched defendant grow up. He saw this altercation, which took place under a street lamp at the end of defendant’s driveway, from his bedroom window. He testified that at first, neither defendant nor Jon P. had anything in his hands. The two men gestured at each other as they argued, but Jon P. did not swing at defendant and did not try to get past him to go towards the house. Defendant picked up a wooden board from his driveway that was three feet long and approximately three inches by four inches across. He raised the board and struck Jon P. with it, bringing it “over the head and down.” Neal D. recounted that, upon being struck, “[t]he other guy, he just went rigid. His hands [dropped] right to his side and he fell straight back, didn’t crumple, just fell straight back. And his head hit the concrete. I thought it was over. [¶] . . . [¶] I thought I had seen him killed.” Neal D. called 911. He stated he did not see defendant at the scene. He said the victim sat up and began moaning about the time the police arrived.

On cross-examination, Raya acknowledged that when he interviewed Jon P. in the hospital, Jon P. disclosed he had been in a fist fight earlier that same evening, around 5:00 p.m., unrelated to his encounter with defendant. Raya admitted that he was not “ever able to determine which injuries” Jon P. sustained in which fight, nor did Raya “know for a fact a fight happened earlier.” Because the blood in Jon P.’s ear looked fresh

at the time of the incident, Raya believed that injury was recent, but he did not know when Jon P. suffered bruising above one eyelid or a cut above his right eyebrow.

Defense counsel objected when the prosecutor sought to introduce two emergency room photographs of Jon P. One primarily showed the left side of Jon P.'s face without any obvious injuries apart from bruising on his right eyelid; the other showed the right side of his face with a small cut and another slightly larger cut or bruise on the center right portion of his forehead. The second photograph also showed deep bruising on Jon P.'s right eyelid, trace amounts of dried blood on his right cheek and right side of his nose, and a moderate to substantial amount of fresh blood in and around his right ear.

Defense counsel argued the photographs should be excluded based on “substantial prejudice” because “we don’t know which—which injuries came from which incident. And we do know that there were two incidents.” The trial court allowed defendant to elicit the officer’s testimony on those points, but overruled the objection. The court observed that the photographs were “not upsetting in nature” and “not that serious.”

DISCUSSION

Defendant contends Evidence Code section 352 (hereafter section 352) required the court to exclude the photographs. We disagree. Section 352 provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” Our high court has emphasized that “[e]vidence is not inadmissible under section 352 unless the probative value is ‘substantially’ outweighed by the probability of a ‘substantial danger’ of undue prejudice or other statutory counterweights.” (*People v. Holford* (2012) 203 Cal.App.4th 155, 167, citing *People v.*

Tran (2011) 51 Cal.4th 1040, 1047.) We review evidentiary rulings under the deferential abuse of discretion standard. (*People v. Loza* (2012) 207 Cal.App.4th 332, 345.)

Here, the elements the prosecutor had to prove included battery causing serious bodily injury. (§§ 243, subd. (d); 12022.7, subds. (a), (f).) Because the photographs tended to aid the People in meeting their burden, the trial court committed no error in admitting them. The trier of fact reasonably could infer from the fresh blood depicted in the photographs that defendant inflicted the requisite degree of injury even if Jon P. had also been involved in an earlier fight. This issue raised a question of fact and the jury was fully aware of the defendant's position that the visible injuries were not caused by defendant. Moreover, even assuming error for the sake of argument, it was harmless under any standard because the evidence, as discussed above, was strong that defendant inflicted serious or significant bodily injury (*ibid.*) on Jon P.

DISPOSITION

The judgment is affirmed.

GOETHALS, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.